

ETHICAL CONSIDERATIONS WHEN YOUR CLIENT STOPS COMMUNICATING

MARCH 26, 2021

BRAD ANDREWS
BAR COUNSEL

UNDERSTANDING THE ETHICAL BASES OF COMMUNICATION

RULE 1.2: SCOPE OF REPRESENTATION

(a) Subject to paragraphs (c) and (d), **a lawyer shall abide by a client's decisions concerning the objectives of representation and as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.** A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. **A lawyer shall abide by a client's decision whether to settle a matter.** In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) **reasonably consult with the client about the means by which the client's objectives are to be accomplished;**

(3) **keep the client reasonably informed about the status of the matter;**

RULE 1.4: COMMUNICATION

(4) promptly comply with reasonable requests for information; including a request for an accounting as required by Rule 1.5(f); and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

WITHDRAWAL ISSUES I.R.P.C. 1.16 AND ENGAGEMENT AGREEMENTS

Mandatory Withdrawal

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer **shall not** represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

PERMISSIVE WITHDRAWAL

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) **withdrawal can be accomplished without material adverse effect on the interests of the client;**
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- 4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

ENGAGEMENT AGREEMENT ISSUES

Some escape clauses simply provide that the lawyer has the discretion to terminate the employment agreement at any time by mailing written notice to the client.

Another example:

If we cannot resolve a problem, you or we may end this relationship at any time, subject to your obligation to pay us according to the terms of the agreement, by giving reasonable notice to the other. (Watch IRPC 1.2 issues)

Another Example

We will endeavor sufficiently before any such termination to assist you in retaining alternate counsel without a lapse in representation. (IRPC 1.16(d))

Others provide for unilateral withdrawal with ten days' notice if the client fails to cooperate, rejects a recommended offer of settlement, or fails to follow instructions and advice on ethical, strategic, or tactical matters.

The problem with these escape clauses is that they take advantage of the unequal position of the client in the attorney-client relationship. They are manipulative and can mislead clients on their authority and rights in the relationship. Furthermore, they violate IRPC 1.2 and likely IRPC 1.16.

A New York ethics opinion concluded that escape clauses were per se unethical. They, however, stressed the following ethical considerations as guidance for drafting escape clauses:

Escape clauses may not mislead the client as to the lawyer's duty to continue the representation.

Escape clauses may not use a client consent stipulation authorizing withdrawal under specified circumstances if it implies that the client has no right to object to withdrawal because of material adverse affect. (See IRPC 1.16(b)(1)).

Escape clauses may not predicate withdrawal on failure to follow advice relating to ethics, strategic, and tactical matters if the effect is to require the client to accept the lawyer's advice on issues that the ethics rules reserve for the client to decide (e.g., settlement). (See IRPC 1.2).

Lawyers should explain the implications of the escape clause to a client at the time the agreement is made. This disclosure should cover the possibility of default of the client's action, the client's continued responsibility for disbursements, and potential liability to the opposing party for costs or sanctions if the lawyer withdraws.

Nothing in an escape clause relieves a withdrawing lawyer from the duty to protect the client's interest under IRPC 1.16(d) e.g., giving reasonable notice of withdrawal, allowing time for retention of another lawyer, and promptly returning papers and property to which the client is entitled.

Withdrawal Procedure

IRCivP 11.3 and 11.4

Governs substitution and withdrawal of attorneys.

IRCivP 11.4

Governs withdrawal if one has made a limited pro bono appearance. *See also* I.R.P.C. 1.2(c).

Ethical Considerations During Withdrawal

I.R.P.C. 1.6
and
I.R.P.C. 1.16

Recent Case Discussing Withdrawal

State v. Hughes, Idaho Court of Appeals, No. 45972, 12/5/19, unpublished opinion.

General Facts

Hughes appeals his conviction for heroin-related charges. The ethical issue relates to Hughes' argument that the district court erred when it denied defense counsel's motion to withdraw.

Counsel's affidavit in support of his motion to withdraw included the following representations:

1. During my most recent discussion with my client about discovery, we discussed his request to file a motion to suppress the search warrant and I provided him with my opinion that such, a motion was frivolous and the legal reasoning behind my opinion.
2. Despite that discussion, Hughes insisted on attempting to address suppression at the pre-trial conference the next day. He also wrote a letter to the court, requesting that counsel file a motion to dismiss the “altered and fake search warrant.”

3. He also sent that letter to the Idaho State Bar. Counsel believes the contact with the Idaho State Bar, while not officially a Bar complaint, puts counsel in a potentially adversarial position with his client.
4. Hughes does not have confidence in my representation, and we are at a legal impasse.
5. Finally, I have an ethical concern which has arisen, but I am not at liberty to disclose that to the court which makes me unable to represent Hughes adequately a trial.

(See also IRPC 1.16, comment 3)

Following hearing, the district court denied counsel's motion to withdraw. The case proceeded to trial and he was found guilty.

On appeal, Hughes argued the district court erred in denying defense counsel's motion to withdraw, because the district court's decision compelled counsel to represent him while laboring under an actual conflict of interest in violation of his Sixth Amendment right to conflict-free counsel.

The Court found that counsel simply advised the district court about issues he was having with his client and did not disparage his client to promote his own interests or disclose confidential information. The opinion noted that the prosecutor was already aware of the conflict presented at the hearing. Most of counsel's argument was in his affidavit and not discussed in open court. **The Court found counsel acted appropriately by explaining the reasons that he sought withdraw at the motion to withdraw hearing and that is precisely the appropriate venue for trial counsel to explain to the Court why he sought to withdraw.** Hughes's contention that the district court has some duty to prevent counsel from discussing the events which led to his motion to withdraw is incorrect. Finally, the Court determined that there was not an actual conflict of interest that violated the Sixth Amendment.

This case provides us an opportunity to discuss I.R.P.C. 1.16 regarding withdrawal, 1.6 regarding confidentiality, and 1.7 regarding conflicts.